Supreme Court, U.S.
FILED
JUL 11 1994
OFFICE OF THE CLERK

No. 93-1975

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

ROBERT HADEN KING JR.

Petitioner,

v.

NEIL BROWN, SUPERINTENDENT
OF THE CLALLAM BAY CORRECTIONS CENTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE GEORGIA CRIMINAL DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

BOBBY LEE COOK
(Counsel for the Georgia
Criminal Defense Lawyers
Association)
Cook & Palmour
126 South Commerce Street
Summerville, Georgia 30747
(706) 857-3421

July 11, 1994 Counsel of Record

No. 93-1975

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

ROBERT HADEN KING JR.

Petitioner,

v.

NEIL BROWN, SUPERINTENDENT
OF THE CLALLAM BAY CORRECTIONS CENTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE GEORGIA CRIMINAL DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

BOBBY LEE COOK
(Counsel for the Georgia
Criminal Defense Lawyers
Association)
Cook & Palmour
126 South Commerce Street
Summerville, Georgia 30747
(706) 857-3421

July 11, 1994 Counsel of Record

ISSUES ADDRESSED BY THE AMICUS CURIAE

1. Does an accused have any constitutional right to enforcement of a plea agreement, based on the due process clause of the fourteenth amendment, where the accused has not yet entered a guilty plea but has performed his part of the bargain by his extensive and life threatening cooperation with the government and by testifying fully at another's trial?

2. Is it proper for a court to fail to consider the due process principles of fundamental fairness which should govern plea agreements in determining whether a defendant has knowingly and intelligently rescinded his plea agreement?

TABLE OF CONTENTS

	Page
ISSUES ADDRESSED BY THE AMICUS CURIAE	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
INTRODUCTORY STATEMENT	5
REASON FOR GRANTING THE WRIT	11
CONCLUSION	43

TABLE OF AUTHORITIES

Cases	Page
Berger v. United States, 295 U.S. 78 (1935)	29, 30
Blackledge v. Allison, 431 U.S. 63 (1977)	25
Bordenkircher v. Hayes, 434 U.S. 357 (1978)	24
Brady v. Maryland, 373 U.S. 83 (1963)	30
Commonwealth v. Reyes, 764 S.W.2d 62 (Ky. 1989)	20
Ex parte Yarber, 437 So. 2d 1330 (Ala. 1983)	20
Hudson v. McMillan, 112 S. Ct. 995 (1992)	35
Innes v. Dalsheim, 864 F.2d 974 (2d Cir. 1988)	26
Jacobson v. United States, 112 S. Ct. 1535 (1992)	30
King v. Brown, 8 F.3d 1403 (9th Cir. 1993)	21, 32, 33, 39
Lassiter v. Department of Social Services, 452 U.S. 18 (1981)	31, 42
Mabry v. Johnson, 467 U.S. 504 (1984)	13, 15, 16, 17 passim

TABLE OF AUTHORITIES (CONT'D)

Cases — Page

People v. Navarroli, 121 Ill. 2d 516, 521 N.E.2d 891 (1988) 18

Ricketts v. Adamson, 483 U.S. 1 (1987) . . . . . 11, 24, 25, 33 passim

Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982) 20

Santobello v. New York, 404 U.S. 257 (1971) 23, 24, 30, 31

State v. Brockman, 277 Md. 687, 357 A.2d 376 (1976) 20

Stokes v. Armontrout, 851 F.2d 1085 (8th Cir. 1988), cert. denied, 488 U.S. 1019 (1989) 17, 27, 29

Townsend v. Sain, 372 U.S. 293 (1963), overruled on other grounds, Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992) 2

United States v. Carrillo, 709 F.2d 35 (9th Cir. 1983) 19

United States v. Coon, 805 F.2d 822 (8th Cir. 1986) 18

United States v. De La Fuente, 8 F.3d 1333 (9th Cir. 1993) 27

United States v. Garcia, 956 F.2d 41 (4th Cir. 1992) 41

TABLE OF AUTHORITIES (CONT'D)

Cases	Page
United States v. Harvey, 791 F.2d 294 (4th Cir. 1986)	40
United States v. Marion, 404 U.S. 307 (1971)	30
United States v. Mozer, 828 F. Supp. 208 (S.D.N.Y. 1993) . . .	41
United States v. Smith, 648 F. Supp. 495 (S.D. Tex. 1986) . . .	26
Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979)	27
Statutes	
Restatement (Second) of Contracts (1981)	33, 42
Sup. Ct. R. 37.2	5
Other	
Alschuler, "The Changing Plea Bargaining Debate," 69 Cal. L. Rev. 652 (1981)	29
Scott & Stuntz, "Plea Bargaining as Contract," 101 Yale L.J. 1909 (1992)	4

INTEREST OF THE AMICUS CURIAE

The Georgia Criminal Defense Lawyers Association (GCDLA), is a Georgia nonprofit corporation with a membership of more than 1,000 lawyers. GCDLA was founded over 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence, and expertise of defense lawyers.

Among GCDLA's stated objectives is the promotion of the proper administration of criminal justice. Consequently, GCDLA is concerned with the protection of individual rights and the improvement of the criminal law, its practices and procedures. The Amicus Curiae Committee of the GCDLA has discussed this case and de-

cided that the issues are of such importance to defense lawyers and criminal defendants throughout the nation that GCDLA should offer its assistance to the Court.

In this case, the Ninth Circuit failed independently to review the state court's determination of competency and also failed to require the district court to hold a hearing on petitioner's habeas claim as mandated by Townsend v. Sain, 372 U.S. 293 (1963), overruled on other grounds, Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992). As the petition demonstrates, the Ninth Circuit's decision conflicts with decisions of other courts of appeals and this Court, and for that reason the petition should be granted.

GCDLA submits this brief respectfully to describe how the Ninth Circuit's decision undermined petitioner's due process right to fundamental fairness in

the plea bargain process, and how this decision, if allowed to stand, will dramatically affect the plea bargaining process in the future. Petitioner entered into a plea agreement with the State of Oregon and fully performed his obligations under that agreement, at great personal risk. Nonetheless, the state reneged on the agreement when, during a period of mental instability, petitioner temporarily refused to enter a formal plea. However, because petitioner was not afforded any hearing on his habeas claim, and because the Ninth Circuit gave unwarranted deference to the district court's determination that he was competent, he had no opportunity either directly to challenge the state's violation of his plea agreement or to seek independent review of his competency at the time he allegedly "withdrew" from that agreement.

The impact of decisions such as the Ninth Circuit's on the criminal justice system cannot be overstated.[1] If criminal defendants, including those who are mentally incompetent, cannot challenge violations of plea agreements through the mechanisms that petitioner sought to use in this case, then law enforcement authorities will have great latitude to violate such agreements with impunity. If that occurs, criminal defendants will no longer trust prosecuting authorities to protect them from the risks inherent in cooperating with the state, and the authorities will lose an

---

[1]Recent studies have shown that as many as 86% of federal prosecutions and 91% of state prosecutions are resolved with guilty pleas. Scott & Stuntz, "Plea Bargaining as Contract," 101 Yale L.J. 1909 n.1 (1992).

extremely valuable tool in fighting crime at its roots.[2]

INTRODUCTORY STATEMENT

This case presents an unfortunate and distressing story of how, under the guise of following contract principles, state and federal courts have unfairly permitted an Oregon state prosecutor to reap the considerable benefits of a plea agreement entered into with the Petitioner, Robert Haden King Jr., and then subsequently deny King his part of the bargain when, during a period of time when King was known to be mentally confused and suffering from an organic mental defect, mental illness, and epilepsy, King irrationally became unclear about his intention to enter his guilty plea.

---

[2]Pursuant to Rule 37.2 of this Court, both the Petitioner and the Respondent have consented to GCDLA's participation as amicus curiae, and letters of consent are being filed with the Court.

The facts underlying the plea bargain between King and the State of Oregon have been set out fully in King's Petition for a Writ of Certiorari. Of critical significance to an understanding of the issues in this case is the fact that King fully performed his part of the agreement, cooperating fully with the state and testifying at great length for the state on several occasions between December 1983 and April 1984.

Equally significant is the fact that during the period of King's performance of his part of the plea agreement, and shortly thereafter, King was the object of serious death threats as a result of his cooperation with the state. The record below completely substantiates the fact that the death threats from organized crime figures against King were genuine and were so intimidating that local prison authorities had to adopt the

most extraordinary security provisions in their history to ensure King's safety.

In addition, compounding the pressures from these death threats was the fact that during this entire period King was suffering from severe mental problems which inhibited his ability to act rationally in connection with his own case. The pressures of his situation led King to stop taking his medication, or to take his medication only erratically, and prison authorities did nothing to remedy this problem. To the contrary, prison authorities added to the problem by chaining him to the floor for extensive periods. King was found by psychiatrist Guy A. Parvaresh, M.D., to be incompetent because he was too mentally impaired to assist in his own defense. This opinion was confirmed by a second psychiatrist, Jerry K. Larsen, M.D., who found that

King suffered from paranoid ideation against his attorneys.

At a competency hearing held on May 31, 1994, King refused to address the court, remaining entirely silent at all times. King's appointed attorney indicated that he was prepared for a trial date to be set, which prompted the prosecutor immediately to take the position that King was withdrawing from his plea agreement. The court determined at the close of the hearing that although King suffered from a mental defect, he met the legal standard of competency to stand trial. The court's determination rested on the testimony of a government psychiatrist, Wesley Weissert, M.D., who stated that he had interviewed King for 30 minutes in March 1994 while King was at Oregon State Hospital. Weissert concluded that while King had organic personality syndrome as a result of his 1979

airplane crash, which had the effect of causing dramatic emotional turbulence that affected his judgment, this disease did not affect his memory or his ability to understand the procedures in court. The court then invited the prosecutor to file a motion seeking a judicial determination that the plea agreement was no longer in effect. Such a motion was filed on June 5, 1984, seeking a ruling that King had rescinded the agreement.

Despite a statement from one of King's attorneys that indicated that King was not prepared to make an intelligent decision on whether to pursue the plea agreement, the court subsequently issued an order ruling that King had breached and irrevocably rescinded the plea agreement by having requested a trial date.

King's petition for a writ of habeas corpus in the United States District Court for the District of Oregon raised

the issues presented by this brief, arguing that the failure of the state court to enforce the plea agreement was a violation of the fundamental fairness component of the due process clause of the fourteenth amendment. The petition argued that under the circumstances of the case it was not fair for the state to reap the benefits of King's full cooperation and testimony without fulfilling its obligation to allow King to plead guilty pursuant to the agreement. In addition, the petition argued that the state had waived its objections to King's failure to enter a guilty plea by using his testimony without insisting on a plea, that King did not have the mental capacity to intelligently withdraw from the plea bargain, that the plea agreement did not by its terms require the entering of the plea by a particular date or time (and indeed that the state had sought three

continuances), and that the state had not shown any prejudice permitting its refusal to allow enforcement of the plea.

REASON FOR GRANTING THE WRIT

In Ricketts v. Adamson, 483 U.S. 1, 16 (1987), Justice Brennan noted that "[t]his Court has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements." This case presents the Court with the opportunity to do just that; the posture of this case gives the Court the chance to provide clear guidelines to the lower courts in this aspect of criminal law which has great national importance but which, in part because of the lack of clear direction from this Court, has been a subject of confusion and conflict among the lower courts.

A.

A critical issue in this case is whether the due process clause of the fourteenth amendment offers any protection to a defendant in the plea bargain process in a state prosecution if the defendant has not yet entered his guilty plea. The district court held that in the absence of a guilty plea a defendant who is seeking enforcement of a plea agreement enjoys no due process protections because he has not been constitutionally prejudiced by his inability to secure the enforcement of the agreement. According to the district court, because in this case King did not waive any of his constitutional rights as a consequence of a guilty plea, he was in the same position after the state's refusal to enforce the agreement as he would have been in the absence of an agreement. While acknowledging that in some cases

detrimental reliance upon an agreement by a defendant may require its enforcement, the district court found that such reliance may occur only in the limited situation in which the state directly uses information against the defendant at trial which was disclosed by the defendant pursuant to the terms of the agreement. For support for this conclusion, the court relied upon the holding in Mabry v. Johnson, 467 U.S. 504 (1984), in which this Court held that a defendant's acceptance of a plea bargain does not create a constitutional right to have the bargain specifically enforced if it is withdrawn by the prosecutor prior to acceptance of a guilty plea.

The reasoning of the district court has significant consequences for any criminal defendant who enters into an agreement with prosecutors or law enforcement officials. It is very common,

for example, for police and prosecutors to ask a defendant to cooperate in revealing the criminal activity of others. In the majority of situations, this type of agreement is entered into at an early stage of the prosecution against the defendant, long before a plea is to be formally entered. Typically the defendant will reach an agreement regarding his plea and then will immediately assist undercover law enforcement officials in uncovering further crimes, obtaining evidence of prior crimes, and revealing the identities of persons involved in those crimes. In these types of situations, the defendants may literally risk their lives by assisting the police. The risk is acceptable to these defendants solely because of the promises which have been made to them. Only after the defendants have cooperated and further arrests are made, however, do the defendants have the

opportunity to enter their pleas in accordance with these types of agreements.

If the courts were to take the position of the district court in this case, the message that would be sent to law enforcement agencies and criminal defendants is that the government simply does not have to fulfill its obligations under plea agreements if it has managed to get the defendants to do their part prior to pleading guilty. According to the district court's position, there is literally no constitutional impediment to subjecting a defendant to life-threatening risks, reaping the benefits of his undercover activity, and then treating the defendant as if no agreement had ever been reached.

Clearly, the approach taken by the district court was incorrect. In Mabry v. Johnson, supra, the Court was not presented with a situation in which a de-

fendant had acted in reliance upon the plea agreement. The facts in Mabry showed that the defendant in a state prosecution had been offered a particular sentence in exchange for his guilty plea to a lesser offense than the one originally charged, but the offer was withdrawn by the prosecutor the next day--after the prosecutor realized he had been too generous in his offer--before the defendant had entered his plea. On these facts, the Court found that there was no constitutional right to the enforcement of the agreement:

> A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.

467 U.S. at 507-08 (footnote omitted). Mabry is thus plainly distinguishable

from the present case, in which King performed his part of the bargain and suffered obvious detriment from his entering into the plea agreement.[3]

The district court's narrow interpretation of the applicability of due process protections in the plea bargaining process does find some support in the decisions of other courts which have taken literally the statement from Mabry that "[i]t is the ensuing guilty plea that implicates the Constitution." Id. at 508; see Stokes v. Armontrout, 851 F.2d 1085 (8th Cir. 1988), cert. denied, 488 U.S. 1019 (1989) (state's withdrawal of offer for plea bargain on county

---

[3]As noted previously, King's decision to cooperate and testify for the state subjected him to death threats necessitating extraordinary security precautions by prison authorities, severe personal injury as a result of an attack by an inmate, tremendous prejudicial pretrial publicity in connection with his testimony, and prejudice relating to his actual testimony provided to the state.

capital murder charge, after defendant repudiated plea bargain agreement by refusing to plead guilty, did not violate Constitution despite fact that defendant's refusal to plead guilty was result of confusion caused by newspaper article erroneously reporting length of sentence incurred in city court plea entered the day before as part of agreement); United States v. Coon, 805 F.2d 822 (8th Cir. 1986) (parties discovered that maximum statutory fine was much higher than thought at time of entering plea agreement); People v. Navarroli, 121 Ill. 2d 516, 521 N.E.2d 891 (1988) (state's repudiation of plea agreement did not deprive defendant of constitutional right because defendant did not plead guilty in reliance on agreement; defendant had no right to enforcement despite fact that he acted as informant in various drug investigations pursuant to agreement).

Other courts are in conflict and disagree with this approach. For example, in United States v. Carrillo, 709 F.2d 35 (9th Cir. 1983), the prosecutor promised the defendant in a drug case that he would not be prosecuted if he cooperated in an investigation of the person who sold the drugs. The defendant then contacted various individuals and arranged drug buys for government agents. Despite these actions, the government then refused to honor its agreement, citing the defendant's refusal to testify against the individuals, a condition which was not part of the original agreement. The court held that "under settled notions of fundamental fairness the government was bound to uphold its end of the bargain." Id. at 37. The court did not hold that the defendant could be tried as long as the government did not use his statements given after the agree-

ment was reached; rather, the court held that the indictment against the defendant had to be dismissed. See also Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982) (due process required the performance of an agreement between the prosecutor and the defendant by which the defendant agreed to testify against codefendants in exchange for immunity); Ex parte Yarber, 437 So. 2d 1330 (Ala. 1983) (holding that plea agreement should be enforced against state even where defendant has demonstrated no detrimental reliance); Commonwealth v. Reyes, 764 S.W.2d 62 (Ky. 1989) (because of due process right to fundamental fairness, prosecutor may not withdraw from immunity agreement after testimony was given by defendant pursuant to agreement); State v. Brockman, 277 Md. 687, 357 A.2d 376 (1976) (once the state chooses to make an agreement, it may not repudiate that agreement with impunity

after defendant has given information in deposition).

In fact, the district court's adherence to the factually distinct Mabry case was implicitly rejected by the Ninth Circuit in its review of this case. In essence, the Ninth Circuit ignored the district court's ruling, failing to address directly in any manner the question of whether a cognizable federal constitutional question had been presented. Rather, the Ninth Circuit, without explaining why it believed that it had jurisdiction over the resolution of the plea agreement dispute in the absence of a due process issue, affirmed the ruling of the district court without direct reference to the due process clause.[4]

---

[4]The court of appeals merely adopted the factual conclusions of the state court, noting that "[t]he factual findings of intentional rescission, competence, and prejudice to the state, are entitled to the presumption of correctness." King v. Brown, 8 F.3d 1403, 1409

The confusion and inconsistency in the approaches taken by the district court and the court of appeals in this case on this threshold issue exemplify the lack of clear standards pertaining to the role of due process in the resolution of disputes concerning plea agreements in which a plea of guilty has not formally been entered. This case therefore presents an important opportunity for this Court to resolve the confusion in the courts concerning this point and to make clear that, in appropriate cases in which fundamental fairness requires it, a defendant can have a due process right to the enforcement of his plea agreement even prior to the entry of his guilty plea.

(9th Cir. 1993). The error in this conclusion regarding the presumption of correctness for an issue which is clearly a combination of fact and law, rather than simply one of fact, is one basis for King's Petition for a Writ of Certiorari.

B.

This Court first touched on the need for consideration of fairness in the resolution of disputes concerning plea agreements in Santobello v. New York, 404 U.S. 257 (1971). Without direct reference to the due process clause,[5] the Court held that it would be unfair to uphold the guilty plea entered by the defendant where the facts showed that he had been promised by the prosecutor that no sentence recommendation would be made to the sentencing court, when in fact at sentencing the state urged the maximum punishment. In holding that the state was bound by the promise, the Court recognized that there must be "fairness in securing agreement between an accused and a prosecutor," id. at 261, and that

---

[5]That the decision in Santobello rested on federal constitutional principles is demonstrated by the fact that the Court reversed a state court judgment.

while "circumstances will vary," courts should ensure that the plea bargaining process is "attended by safeguards to insure the defendant [receives] what is reasonably due in the circumstances." Id. at 262.

Since the decision in Santobello, the Court has on occasion addressed issues arising out of plea agreements, but has not developed further the extent to which due process principles should govern the resolution of disputes concerning the enforcement of plea agreements. See Ricketts v. Adamson, supra (defendant's failure to comply with plea agreement by refusing to testify at codefendants' retrial as required in agreement removed double jeopardy bar to prosecution of defendant on original charges after defendant had been sentenced on lesser offense); Bordenkircher v. Hayes, 434 U.S. 357 (1978) (due process clause is not

violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged); Blackledge v. Allison, 431 U.S. 63 (1977) (habeas corpus petitioner entitled to hearing or full opportunity to present relevant facts to determine whether his guilty plea was induced by unkept oral agreement which did not appear in written record).

Justice Brennan, speaking for the four dissenters in Ricketts v. Adamson, supra, urged a careful consideration of due process and plea bargains, noting that while principles of commercial contract law can be a useful point of departure in construing a plea agreement,

> commercial contract law can do no more than this, because plea

> agreements are constitutional contracts. The values that underlie commercial contract law, and that govern the relations between economic actors, are not coextensive with those that underlie the Due Process Clause, and that govern relations between criminal defendants and the State. Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the Constitution.

483 U.S. at 16.

This view has been echoed in a number of lower court decisions. For example, in Innes v. Dalsheim, 864 F.2d 974, 978 (2d Cir. 1988), the court stated: "Comparing a criminal defendant with a merchant in the marketplace is an inappropriate analogy that we have rejected. The law of commercial contracts plays only a limited role in resolving a plea dispute." See also United States v. Smith, 648 F. Supp. 495, 498 (S.D. Tex. 1986) ("Unlike contracts, Plea Bargains involve a myriad of collateral considera-

tions such as expectations of fundamental fairness by the Defendants, efficient administration of justice, and the integrity of the Government's promises"); Workman v. Commonwealth, 580 S.W.2d 206, 207 (Ky. 1979) ("The standards of the market place do not and should not govern the relationship between the government and a citizen").

On the other hand, other courts have minimized the importance of constitutional due process in the resolution of disputes concerning the enforcement of plea agreements. See, e.g., Stokes v. Armontrout, supra, 851 F.2d at 1089 ("The Supreme Court narrowed the broad 'fairness' guarantee of Santobello in Mabry v. Johnson"); United States v. De La Fuente, 8 F.3d 1333, 1337 (9th Cir. 1993) ("Plea agreements are contractual in nature and are measured by contract law standards"). The Ninth Circuit opin-

ion in this case--which literally did not mention due process in its discussion of the plea agreement issue--clearly reflects the view that pure contract principles are adequate for sorting out what the parties to a plea bargain are entitled to under the circumstances.

The view that basic notions of fundamental fairness should inform commercial contract principles in the plea bargaining context is compelled by the obvious fact that the parties to such agreements simply do not come to the bargaining table in the same capacity as ordinary commercial parties. On the one hand, the defendant comes to the bargaining table in a weakened position. Accused of a crime, incarcerated, cut off from traditional sources of support, often ignorant of his rights, and perhaps only hastily counseled by an attorney, a criminal defendant is not likely to make

the same manner of decisions concerning his contract which would be expected of a party to a commercial contract.[6] On the other hand, the prosecutor comes to the negotiations with the full power of the government at his disposal.

Moreover, this Court has long recognized that a prosecutor is not simply the representative of one of two equal parties to a criminal proceeding, but rather occupies a special position by virtue of his authority as the representative of the government. As noted in Berger v. United States, 295 U.S. 78, 88 (1935), the government's "interest . . .

---

[6]For a particularly unfortunate example, see Stokes v. Armontrout, supra, in which the defendant's one-day hesitance to plead guilty to a reduced charge, based on his ignorance and his misunderstanding of what had transpired in a prior plea, cost him a concurrent sentence of imprisonment and ultimately resulted in his receiving the death penalty. See also Alschuler, "The Changing Plea Bargaining Debate," 69 Cal. L. Rev. 652 (1981).

in a criminal prosecution is not that it shall win a case, but that justice shall be done." The Court has thus found in a variety of contexts that in bringing a criminal prosecution the government's attorney has an overriding obligation to ensure that the proceedings are conducted with fairness and in conformity with due process. Berger v. United States, supra (improper statements of prosecutor at trial violated due process rights of defendant); Brady v. Maryland, 373 U.S. 83 (1963) (suppression of exculpatory evidence by prosecutor violates due process clause); United States v. Marion, 404 U.S. 307 (1971) (due process clause may provide basis for dismissing an indictment if the defense can show at trial that prosecutorial delay in bringing the accusation has prejudiced the right to fair trial); Santobello v. New York, supra; cf. Jacobson v. United States, 112

S. Ct. 1535 (1992) (due process precludes prosecution where government initiates crime by implanting disposition to commit crime in the mind of the defendant).

Because of the nature of a criminal prosecution and the attendant imbalance in the respective roles of the defendant and the government, it must be established by the Court that the ordinary rules of contracts are not totally dispositive in plea agreement disputes. Instead, in conformity with the Court's precedent in Santobello v. New York, supra, concepts of fundamental fairness must guide the courts in resolving such conflicts. As in any area, the application of due process principles is not necessarily simple or precise. The Court stated in Lassiter v. Department of Social Services, 452 U.S. 18, 24-25 (1981):

> Applying the Due Process Clause is . . . an uncertain

> enterprise which [requires that we] discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

What transpired in this case demonstrates in the extreme how the failure to incorporate basic due process principles into the decision-making processes of the courts below significantly altered the outcome of the case. A review of the Ninth Circuit's decision reveals that the court analyzed the plea agreement issue solely in terms of a commercial contract dispute. Moreover, the court simply adopted state court conclusions which similarly were reached with no consideration of due process. The court first simply deferred to the state court determination that King was "competent when he rescinded the plea agreement." King v. Brown, 8 F.3d 1403, 1408 (9th Cir. 1993). The court then adopted the state court

ruling that King had in fact rescinded his agreement, based on his statements regarding incarceration in Alabama, the request for a trial date, and his silence regarding his intention to plead guilty by a particular time set by the state. Id. at 1408. Quoting Ricketts v. Adamson, supra, 483 U.S. at 6 n.3, the court concluded that "'[t]he construction of a plea agreement in a state prosecution and the concomitant obligations flowing from it are, within broad bounds of reasonableness, matters of state law.'" King v. Brown, supra, 8 F.3d at 1408. In determining that the state court findings were within the bounds of reasonableness, however, the court of appeals looked solely to the Restatement (Second) of Contracts and not to the due process clause. Id. at 1409. In fact, the court explicitly disclaimed any effort to analyze the issue in due process terms:

"'[W]e cannot engage in 'second guessing the finding of breach' or substitute an independent federal interpretation[.]'" Id. (quoting Ricketts v. Adamson, supra, 483 U.S. at 6 n.3). The approach of the court--without any reliance on basic principles of fairness--skewed the results of the case. Moreover, even under basic contract principles, the court reached the wrong decision.

A proper analysis, under due process principles, would have highlighted these facts: King cooperated fully with the government in connection with his testimony against James Salter; King exposed himself to considerable personal risk by agreeing to cooperate; King was physically attacked and injured as a result of his testimony in conformity with the plea agreement; King exposed himself to extraordinary prejudicial pretrial publicity as a result of his testimony; the govern-

ment obtained evidence as a result of King's testimony; King incriminated himself by his testimony, regardless of whether the state directly used that testimony against him; King's hesitance to plead guilty took place at a time when he was suffering from considerable mental problems which necessitated a competency hearing;[7] although found by the trial court to be mentally competent for purposes of trial, King was assessed by the government's own psychiatric expert as having a mental defect which affected his

---

[7]While King's severe mental confusion was due in part to the fact that he was not taking his medication, this Court recently emphasized that the government has the strict obligation to provide inmates with adequate medical care. Hudson v. McMillan, 112 S. Ct. 995, 998 (1992). The State of Oregon did not fulfill this duty during the time in question, as its prison officials failed to insure that King received his proper medication. The state thus shares any responsibility for King's mental deterioration during this time when he was to plead guilty pursuant to the plea agreement.

ability to exercise proper judgment; King had no rational reason to fail to finalize the agreement by entering his plea, as he had literally nothing to gain by not pleading guilty, since the 10-year sentence to be served under the agreement was to be concurrent with his longer sentence in Washington; the plea agreement contained no provision requiring the guilty plea to be entered within a certain period of time; King was willing to plead guilty weeks prior to trial; and the prosecutor presented literally no evidence or proof of any harm to the government as a result of King's delay in pleading guilty. In short, the government received everything it expected from King under the bargain except his guilty plea by a certain date, a condition which was not even part of the agreement. The vague and unsubstantiated claims of prejudice allegedly suffered by the govern-

ment in awaiting his guilty plea were far outweighed by the very real detriment suffered by King and by the tremendously unfair outcome of requiring King to go to trial after having fully cooperated with the government. Plainly, the state could not have been prejudiced by the short delay that resulted from King's decision whether to plead guilty. The concerns asserted by the government--expenses, scheduling difficulties, out-of-state witnesses--were essentially frivolous and did not relate to the short time period attributable to King's actions, but rather to the entire period of time King's trial was pending--including the period during which the trial was continued so that King could testify for the state. Moreover, it is obvious that all of the state's concerns regarding the difficulty and expense of trial preparation, which were directed at the goal of

convicting King, would have been eliminated simply by accepting King's guilty plea. The only logical explanation for the state's action was its desire to save face by putting King to a public trial after having lost the Salter case.

As noted above, the state courts and the Ninth Circuit focused on two actions by King which supposedly indicated an intention not to perform the remainder of his part of the agreement and thus were found to be a repudiation of the contract after only partial performance, excusing the government from complying with the agreement. Even under basic contract principles, these actions could not support a finding of repudiation. First, King was said to have told a district attorney in February 1984 that he would not plead guilty "unless he got more than he had bargained for--he wanted Alabama incarceration, in addition to ten year

parole eligibility and concurrent sentence." King v. Brown, supra, 8 F.3d at 1409. According to the court of appeals,

> [h]is repudiation was not a casual remark taken advantage of by a prosecutor eager to escape performance--he was brought into court, with counsel, and the matter was carefully reviewed in a context which gave King an opportunity to clarify his intention to adhere to the plea bargain, had that been his intention. King's repudiation of his agreement excused the government's failure to perform its part of the bargain.

Id. The court of appeals failed to note, however, that King's lengthy three-day testimony in Salter's trial came after this statement, which obviously showed that the state could not have possibly considered the statement a repudiation of the agreement. In short, the state was perfectly comfortable in giving the statement no significance when that position benefited the state, but later claiming the statement was a repudiation

when that contrary position benefited the state.

Second, the court of appeals found it of crucial significance that King had asked for a trial date and stood silent when asked if he intended to plead guilty. According to the court of appeals, this too was a repudiation of the agreement. However, as was emphasized in the dissenting opinion of Judge Pregerson, the agreement did not contain a requirement that King plead guilty by any particular date, and it was the state's attempt to graft such a provision onto the agreement that deviated from the agreement. Id. at 1414. It is well accepted even under plain contract principles that any ambiguity or uncertainty in a plea agreement is to be construed against the government. E.g., United States v. Harvey, 791 F.2d 294, 300-01 (4th Cir. 1986) (both constitutional and

supervisory concerns require holding the government to a greater degree of responsibility than the defendant for imprecisions or ambiguities in plea agreements); United States v. Garcia, 956 F.2d 41 (4th Cir. 1992) (same). Even more important, it is not at all unusual for the government to draft a plea agreement with a set date by which the plea must be entered. E.g., United States v. Mozer, 828 F. Supp. 208 (S.D.N.Y. 1993) (plea agreement provided that government would accept plea "no later than December 3, 1992"). Had the state felt a plea was essential at a particular time prior to trial in this case, it could have so provided in the terms of the agreement. However, it chose not to include such a term, and it could not later attempt to alter the agreement by insisting on a plea by a particular date.

Under an appropriate due process analysis, these supposedly critical two actions by King would be just part of the equation in determining the appropriate resolution of this conflict. Examining the totality of the circumstances, including King's weakened mental state at the time of his indecision regarding the guilty plea and "assessing the several interests that are at stake," Lassiter v. Department of Social Services, supra, 452 U.S. at 24-25, the courts below would no doubt have reached a result more in conformity with fundamental fairness than one dictated by a selective application of the Restatement (Second) of Contracts.

The requirements of fundamental fairness have not been served in this case, and the National Association of Criminal Defense Lawyers submits that in order to rectify the injustice in this case and to prevent similar situations

involving other defendants in the future the Court should review the decision below.

CONCLUSION

For all of the foregoing reasons, the Georgia Criminal Defense Lawyers Association requests this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

BOBBY LEE COOK
(Counsel for the Georgia
Criminal Defense
Lawyers Association)
Cook & Palmour
126 South Commerce Street
Summerville, Georgia 30747
(706) 857-3421

July 11, 1994 Counsel of Record